(2)

No. 06-1015

FILED

FEB 23 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

BRIAN BELLEQUE, SUPERINTENDENT,
OREGON STATE PENITENTIARY,

Petitioner,

v.

PHILLIP L. KEPHART,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WISCONSIN, AND WYOMING IN SUPPORT OF THE PETITION

EDMUND G. BROWN JR.
Attorney General of California

MANUEL M. MEDEIROS
State Solicitor General

DONALD DENICOLA
Assistant Solicitor General

DAVID ANDREW ELDRIDGE
Deputy Attorney General

BRIAN R. MEANS
Deputy Attorney General
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5254
Fax: (916) 324-2960
Counsel for Amici Curiae States

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Attorney General of Alabama

TALIS J. COLBERG
Attorney General of Alaska

TERRY GODDARD
Attorney General of Arizona

DUSTIN MCDANIEL
Attorney General of Arkansas

JOHN W. SUTHERS
Attorney General of Colorado

KEVIN T. KANE
Chief State's Attorney of Connecticut

JOSEPH R. BIDEN, III
Attorney General of Delaware

MARK J. BENNETT
Attorney General of Hawaii

LAWRENCE G. WASDEN
Attorney General of Idaho

TOM MILLER
Attorney General of Iowa

PAUL J. MORRISON
Attorney General of Kansas

GREGORY D. STUMBO
Attorney General of Kentucky

CHARLES C. FOTI, JR.
Attorney General of Louisiana

DOUGLAS F. GANSLER
Attorney General of Maryland

MICHAEL A. COX
Attorney General of Michigan

JIM HOOD
Attorney General of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

MIKE MCGRATH
Attorney General of Montana

JON BRUNING
Attorney General of Nebraska

CATHERINE CORTEZ MASTO
Attorney General of Nevada

KELLY A. AYOTTE
Attorney General of New Hampshire

W.A. DREW EDMONDSON
Attorney General of Oklahoma

HENRY D. MCMASTER
Attorney General of South Carolina

LAWRENCE E. LONG
Attorney General of South Dakota

ROBERT E. COOPER, JR.
Attorney General and Reporter of Tennessee

GREG ABBOTT
Attorney General of Texas

MARK L. SHURTLEFF
Attorney General of Utah

WILLIAM H. SORRELL
Attorney General of Vermont

ROBERT J. MCKENNA
Attorney General of Washington

J.B. VAN HOLLEN
Attorney General of Wisconsin

PATRICK J. CRANK
Attorney General of Wyoming

QUESTION PRESENTED

In *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998), this Court held in a unanimous decision that "[e]quitable tolling is not permissible where it is inconsistent with the text" of the relevant statute of limitations. In this case, the Antiterrorism and Effective Death Penalty Act (AEDPA) provides a one-year statute of limitations for state prisoners seeking habeas relief, and sets forth in detail those events that trigger and toll the limitations period.

The question presented here is: Did Congress intend for courts to read other non-specified, open-ended tolling provisions into the statute?

TABLE OF CONTENTS

	Page
Question Presented	i
Interest of *Amici Curiae*	1
Reasons for Granting the Petition	1
Argument	3
I. The Ninth Circuit's Decision Conflicts with AEDPA and with This Court's Equitable Tolling Precedents	3
II. Non-Statutory Tolling of AEDPA's Limitations Period Imposes Illogical, Costly, and Unnecessary Burdens on State Resources	14
Conclusion	20

TABLE OF AUTHORITIES

Page

CASES

Acosta v. *Artuz*
221 F.3d 117 (2d Cir. 2000) 15

Alexander v. *Cockrell*
294 F.3d 626 (5th Cir. 2002) 16

Baldayaque v. *United States*
338 F.3d 145 (2d Cir. 2003) 12

Bowen v. *City of New York*
476 U.S. 467 (1986) 6

Burnett v. *New York Cent. R.R. Co.*
380 U.S. 424 (1965) 5

Calderon v. *Thompson*
523 U.S. 538 (1998) 18

Calderon v. *United States Dist. Court*
128 F.3d 1283 (9th Cir. 1997) 12, 14

Cobas v. *Burgess*
306 F.3d 441 (6th Cir. 2002) 16

Custis v. *United States*
511 U.S. 485 (1994) 18

David v. *Hall*
318 F.3d 343 (1st Cir. 2003) 12, 19

Davis v. *Johnson*
158 F.3d 806 (5th Cir. 1998) 14

Day v. *McDonough*
___ U.S. ___, 126 S. Ct. 1675 (2006) 14

Donovan v. *Maine*
276 F.3d 87 (1st Cir. 2002) 13, 16

TABLE OF AUTHORITIES – Continued

Page

Duncan v. *Walker*
533 U.S. 167 (2001) 4, 15

Dunlap v. *United States*
250 F.3d 1001 (6th Cir. 2001) 12, 14

Engle v. *Isaac*
456 U.S. 107 (1982) 19

Evans v. *Chavis*
546 U.S. 189 (2006) 4

Fisher v. *Johnson*
174 F.3d 710 (5th Cir. 1999) 12, 16

Gassler v. *Bruton*
255 F.3d 492 (8th Cir. 2001) 17

Giles v. *United States*
6 F. Supp. 2d 648 (E.D. Mich. 1998) 9, 13

Hardy v. *Conway*
299 F. Supp. 2d 159 (E.D.N.Y. 2004) 17

Harris v. *Hutchinson*
209 F.3d 325 (4th Cir. 2000) 12, 14

Henderson v. *Kibbe*
431 U.S. 145 (1997) 8

Hernandez v. *Sullivan*
397 F. Supp. 2d 1205 (C.D. Cal. 2005) 13

Honda v. *Clark*
386 U.S. 484 (1967) 5

Jihad v. *Hvass*
267 F.3d 803 (8th Cir. 2001) 16

Kreutzer v. *Bowersox*
231 F.3d 460 (8th Cir. 2000) 12

TABLE OF AUTHORITIES – Continued

Page

Lacava v. *Kyler*
398 F.3d 271 (3d Cir. 2005) 17

Lattimore v. *Dubois*
311 F.3d 46 (1st Cir. 2002) 16

Lawrence v. *Florida*, ___ S. Ct. ___ 2007 WL 505972
(U.S. Feb. 20, 2007) (No. 05-8820) 4

Laws v. *Lamarque*
351 F.3d 919 (9th Cir. 2003) 17, 18

Leatherman v. *Tarrant Narcotics Intelligence and Coordination Unit*
507 U.S. 163 (1993) 10

Lindh v. *Murphy*
531 U.S. 320 (1997) 11

Marsh v. *Soares*
223 F.3d 1217 (10th Cir. 2000) 16

Miller v. *Marr*
141 F.3d 976 (10th Cir. 1998) 12, 14

Miller v. *N.J. State Dep't of Corrections*
145 F.3d 616 (3d Cir. 1998) 12, 14

Modrowski v. *Mote*
322 F.3d 965 (7th Cir. 2003) 16

Moore v. *United States*
173 F.3d 1131 (8th Cir. 1999) 14

Nara v. *Frank*
264 F.3d 310 (3d Cir. 2001) 18

National R. R. Passenger Corp. v. *Passengers Ass'n of R. R. Passengers*
414 U.S. 453 (1974) 10

TABLE OF AUTHORITIES – Continued

Page

Neverson v. *Farquharson*
366 F.3d 32 (1st Cir. 2004) 12

Pace v. *DiGuglielmo*
544 U.S. 408 (2005) 4

Paige v. *United States*,
171 F.3d 559 (8th Cir. 1999) 16

Pauley v. *Bethenergy Mines, Inc.*
501 U.S. 680 (1991) 10

Pliler v. *Ford*
542 U.S. 225 (2004) 4

Rhines v. *Weber*
544 U.S. 269 (2005) 15

Sandvik v. *United States*
177 F.3d 1269 (11th Cir. 1999) 12, 14

Shannon v. *Newland*
410 F.3d 1083 (9th Cir. 2005) 17

Smith v. *McGinnis*
208 F.3d 13 (2d Cir. 2000) 14

Solomon v. *United States*
467 F.3d 928 (6th Cir. 2006) 4, 13, 14

Spitsyn v. *Moore*
345 F.3d 796 (9th Cir. 2003) 18

Taliani v. *Chrans*
189 F.3d 597 (7th Cir. 1999) 12, 13, 14

Tennessee Valley Authority v. *Hill*
437 U.S. 153 (1978) 10

Trenkler v. *United States*
268 F.3d 16 (1st Cir. 2001) 17

TABLE OF AUTHORITIES – Continued

Page

TRW Inc. v. *Andrews*
534 U.S. 19 (2001) 9

United States v. *Beggerly*
524 U.S. 38 (1998) 6, 7, 8, 9, 13

United States v. *Brockamp*
519 U.S. 347 (1997) 5, 9, 12

United States v. *Giles*
238 F.3d 425 (6th Cir. 2000) 10

United States v. *Pollard*
161 F. Supp. 2d 1 (D.D.C. 2001) 9, 13

United States v. *Wells Fargo Bank*
485 U.S. 351 (1988) 10

Valverde v. *Stinson*
224 F.3d 129 (2d Cir. 2000) 17

Whalem/Hunt v. *Early*
233 F.3d 1146 (9th Cir. 2000) (en banc) 16, 17

Wilson v. *Battles*
302 F.3d 745 (7th Cir. 2002) 16

STATUTES

26 U.S.C.
§ 6511 ..... 5, 6

28 U.S.C.
§ 2244(d)(1) 1, 2, 3, 4

28 U.S.C.
§ 2244(d)(1)(A) 11

28 U.S.C.
§ 2244(d)(1)(B) 6, 8, 10

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C.
§ 2244(d)(1)(C) 7, 9, 10

28 U.S.C.
§ 2244(d)(1)(D) 6, 7, 10

28 U.S.C.
§ 2244(d)(2) 4, 7, 9, 10

28 U.S.C.
§ 2255 ..... 3, 4, 7, 10, 13

28 U.S.C.
§ 2263(a) 11

28 U.S.C.
§ 2263(b)(1) 11

28 U.S.C.
§ 2263(b)(3) 11

42 U.S.C.
§ 2000e-16(c) 5, 8

OTHER AUTHORITIES

Lisa L. Bellamy, *Playing For Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 Am. J. Crim. L. 1, 53-54 (2004) 17, 18

INTEREST OF *AMICI CURIAE*

The *amici* States, through their Attorneys General, respectfully submit their brief in support of petitioner. In 1996 Congress enacted AEDPA, which gives prisoners one year to challenge in federal court their final state court convictions. 28 U.S.C. § 2244(d)(1). Congress' purpose in enacting this statute of limitations was to expedite finality, promote certainty, and conserve limited state criminal justice resources.

This case presents the question of whether the judiciary may extend the limitations period for reasons beyond those provided in the statute. The resolution of this question is of great importance to the *amici* States. By creating non-statutory exceptions to the limitations period, federal courts have seriously undermined Congress' objectives. Judge-made exceptions to the statute inappropriately expose final state criminal judgments to prolonged jeopardy.

Moreover, states are forced to litigate the question of equitable tolling in potentially thousands of habeas cases each year. Because equitable tolling is highly fact-dependent and its application varies from case to case, the burden on states—both in terms of delay and costs—is substantial.

For these reasons, 32 States urge the Court to grant certiorari and resolve this important question.

REASONS FOR GRANTING THE PETITION

This Court has stated that equitable tolling is not permissible where it would be inconsistent with the text of the pertinent statute of limitations. In enacting 28 U.S.C.

§ 2244(d), Congress set forth in detail events that both trigger and toll the limitations period. This detailed statutory scheme evinces Congress' intent that courts may not read non-specified, open-ended exceptions into the statute.

Many courts of appeals—including the Ninth Circuit—have erroneously permitted tolling of § 2244(d) for so-called equitable reasons. Allowing prisoners to litigate the applicability of such non-statutory tolling has exacted a high price. Extending the statutory limitations period upsets the balance struck by Congress. And it undermines important finality and comity interests by exposing state criminal judgments to unduly prolonged uncertainty and jeopardy.

Moreover, courts are called upon to resolve claims of non-statutory tolling in potentially thousands of AEDPA cases each year. Because these tolling determinations are fact-intensive and made on a case-by-case basis, litigation over them can be especially time-consuming. Not infrequently, evidentiary hearings are ordered. Often, the limitations defense Congress gave to the states in AEDPA results in more litigation and a greater consumption of resources than would resolution of the prisoner's belated claims on their merits—something Congress certainly did not intend. The result is burdensome litigation that drains not just state criminal justice resources but federal court resources too.

Because the Ninth Circuit's decision is inconsistent with AEDPA and this Court's jurisprudence on judge-made tolling, and because of the substantial importance of the question to the *amici* States, the petition for a writ of certiorari should be granted.

ARGUMENT

I. The Ninth Circuit's Decision Conflicts with AEDPA and with This Court's Equitable Tolling Precedents

1. Prior to the enactment of AEDPA, no statute limited the time for filing federal habeas petitions. The result was that prisoners delayed the filing of habeas applications, often for years, undermining finality and prejudicing the states' ability to defend against the petition or re-try the criminal case.

Frustrated by these delays and wanting an eventual end to the review process, so that genuine finality could be accorded to state convictions, Congress in AEDPA enacted a fixed time limit for collateral attacks in federal court on a judgment of conviction. Under 28 U.S.C. § 2244(d)(1), "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." *See also* 28 U.S.C. § 2255, ¶ 6 (imposing one-year limitations period in which to file a motion to vacate a federal conviction). Section 2244(d)(1) provides that the one year limitations period runs from the latter of four events:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme

> Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

The statute also permits tolling for the time "during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending. . . . " 28 U.S.C. § 2244(d)(2); *see generally Evans* v. *Chavis*, 546 U.S. 189 (2006).

Thus, the AEDPA statute of limitations sets out a detailed list of the circumstances Congress deemed sufficient to justify expansion of the one-year period.

2. This Court has not resolved the precise question of whether the limitations period of § 2244(d)(1) (or § 2255, ¶ 6) may be tolled for other non-statutory "equitable" reasons. *Lawrence* v. *Florida*, ___ S. Ct. ___ 2007 WL 505972, *6 (U.S. Feb. 20, 2007) (No. 05-8820) ("We have not decided whether § 2244(d) allows for equitable tolling. . . . Because the parties agree that equitable tolling is available, we assume without deciding that it is."); *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005) ("We have never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations."); *Duncan* v. *Walker*, 533 U.S. 167, 181 (2001) ("We . . . have no occasion to address the question that Justice Stevens raises concerning the availability of equitable tolling."); *cf. Pliler* v. *Ford*, 542 U.S. 225 (2004); *see also Solomon* v. *United States*, 467 F.3d 928, 937 (6th Cir. 2006) ("To date, the Supreme Court has yet to rule whether the judiciary is authorized to rewrite 28 U.S.C. § 2255 to include other 'equitable' grounds of tolling not provided for by Congress.") (Griffin, J., dissenting).

Nevertheless, this Court has made it clear that "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998). The relevant statute in *Beggerly* provided that the twelve-year limitations period would not begin to run until the plaintiff "knew or should have known of the claim." *Id.* This Court found the statute thereby already "effectively allowed for equitable tolling" on a specified ground. *Id.* Given that, and the unusually generous limitations period, this Court held in a unanimous decision that "extension of the statutory period by additional equitable tolling would be unwarranted." *Id.* at 48-49; *see also Honda* v. *Clark*, 386 U.S. 484, 501 (1967) (whether a federal statute of limitations is subject to equitable tolling should be controlled by the question of whether equitable tolling would be "consistent with the overall congressional purpose" for the statute); *cf. Burnett* v. *New York Cent. R.R. Co.*, 380 U.S. 424, 426-27 (1965) ("The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one of legislative intent whether the right shall be enforceable after the prescribed time . . . [T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.") (quotations omitted).

Only one year before deciding *Beggerly*, this Court in *United States* v. *Brockamp*, 519 U.S. 347 (1997), also a unanimous decision, held that equitable tolling was not permissible under the three-year tax-refund limitations period in 26 U.S.C. § 6511. The Court explained that, because limitations statutes ordinarily use fairly simple language, it is often plausible to read the statute as containing an implied equitable tolling exception. *Id.* at 350. The Court cited 42 U.S.C. § 2000e-16(c) (requiring suit for employment discrimination to be filed "[w]ithin 90

days of receipt of notice of final [EEOC] action . . . ") as language indicative of an ordinary limitations statute. *Id.* But the Court went on to explain that § 6511 used language that was "not simple." Instead, the statute set forth "its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions." *Id.* Under those circumstances, the Court held that the statute's detail, and the explicit listing of exceptions, "taken together indicate to us that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *Id.* at 352; *cf. Bowen* v. *City of New York*, 476 U.S. 467, 480 (1986) (equitable tolling of 60-day limitations period permissible where "contained in a statute that Congress designed to be 'unusually protective' of claimants" and was "consistent with the overall congressional purpose and nowhere eschewed by Congress.").

3. The rationale of *Beggerly* and *Brockamp* applies here. Although 28 U.S.C. § 2244(d)(1)(D) sets forth a default limitations period commencing from the date the conviction becomes final, the statute includes detailed and case-specific extensions bearing directly on the diligence of the prisoner.

a. For example, notwithstanding the default limitations period, an extended limitations period will apply to the entire petition if the prisoner's ability to file the petition within the default period was impeded "by State action in violation of the Constitution or laws of the United States," so long as the prisoner was diligent (i.e., if he filed within one year) after the impediment was removed. 28 U.S.C. § 2244(d)(1)(B). This is one way in which the statute effectively tolls the limitations period

(for the entire petition) based upon the diligence of the prisoner—i.e., based on case-specific equitable considerations. *See Beggerly*, 524 U.S. at 48.

And that is not the only form of equitable tolling built into the statute. Section 2244 (like § 2255) also effectively tolls the limitations period (again, as to the entire petition) by recognizing, as a mark of diligence, the prisoner's proper filing of petitions for post-conviction relief in state court. Thus, the limitations period is tolled by excluding the time when such a state petition is pending. 28 U.S.C. § 2244(d)(2).

Congress also did not limit statutory tolling to the filing of the overall petition. Section 2244 permits individual claims to be presented, even if other claims in a petition are untimely. Thus, if this Court recognizes a new right and immediately and expressly makes the right cognizable on collateral review, a prisoner will be deemed diligent so long as he presents his claim invoking the new right within one year thereafter. 28 U.S.C. § 2244(d)(1)(C).

Likewise, the statute accounts for the prisoner's diligent efforts to discover the "factual predicate" of an individual claim. So long as the prisoner files within one year of the date upon which he knew or should have known of that factual predicate, the individual claim may be considered. 28 U.S.C. § 2244(d)(1)(D).

The foregoing statutory detailing demonstrates that, when fashioning the limitations statute, Congress considered and balanced equitable factors in determining (1) what should be the default limitations period, (2) what causes for delayed filing beyond that period should *not* be counted against a prisoner, and (3) how long (no more than

one year) the prisoner should have to respond to such causes. In short, the detailed scheme must be deemed to have "already effectively allowed for equitable tolling." *Beggerly*, 524 U.S. at 48.

Further, Congress allows a prisoner to wait until one year past the finality of his conviction on direct review—even though he often will have learned of the relevant facts for his claim years before (e.g., at the time of trial). That itself is an allowance of "unusually generous nature," *Beggerly*, 524 U.S. at 48-49, which also militates against open-ended ad hoc tolling. *See, e.g.,* 42 U.S.C. § 2000e-16(c) (requiring suits to be filed "within 90 days of receipt of notice of final action.").

Lastly, the interest in finality is extremely important. *See Beggerly*, 524 U.S. at 49. At issue in these federal habeas proceedings is nothing less than the power of the sovereign states to enforce their judgments in criminal cases. The states have a "strong interest in preserving the finality" of such judgments. *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.13 (1977). That interest cannot be dismissed as less important than the interest in settling the title to a plot of land—an interest found to be of sufficient importance in *Beggerly* itself. 524 U.S. at 49.

These statutory features, and the importance of the interest in finality, compel application of the logic of *Beggerly* to bar non-statutory "equitable" tolling of § 2244(d)'s limitations period. In striking the balance it did in AEDPA, Congress identified those equitable considerations which Congress believed should affect the one-year limitations period. Congress provided for tolling when state actors are chargeable for the delayed filing, 28 U.S.C. § 2244(d)(1)(B), and when the timing of this Court's

decision accounts for delayed filing, § 2244(d)(1)(C), and when the state courts are chargeable for the delayed filing (while a state petition is pending before a state court), § 2244(d)(2). In light of such careful consideration by Congress, *Beggerly* teaches that the balance has been *statutorily* struck as to what causes of delayed filing are not to be chargeable against the prisoner. Under the logic of *Beggerly*, it follows that Congress intended that other causes of delayed filing *are* to be chargeable against the prisoner—and thus not to be predicates for non-statutory "equitable" tolling. *Beggerly*, 524 U.S. at 48-49.

b. *Brockamp* reinforces this conclusion. It may be observed, for example, that AEDPA's tolling provisions are detailed and delineated. Some logically apply to an entire petition, while others logically apply on a claim-by-claim basis. These explicit provisions, taken together, indicate that "Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *Brockamp*, 519 U.S. at 352. Rather, the "most natural reading of [the statute] is that Congress implicitly excluded a general [] rule by explicitly including a more limited one." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001); *see United States* v. *Pollard*, 161 F. Supp. 2d 1, 12 (D.D.C. 2001) ("The fact that Congress chose to expressly enumerate the circumstances that would start and stop the statute of limitations [in § 2255] undermines defendant's argument that Congress also chose to allow non-specified means to toll the statute of limitations. It appears that Congress did not intend for the courts to interpret the statute as permitting other open-ended means of tolling the statute of limitations."); *Giles* v. *United States*, 6 F. Supp. 2d 648, 650 (E.D. Mich. 1998)

("[T]he language of § 2255 indicates that Congress intended to limit a federal court's discretion in tolling the one year time limit. Section 2255 expressly lists four different events, the latest of which determines when the limitations period begins to run. 28 U.S.C. § 2255. The detail of § 2255 and its direct and express determination of when the time limit begins indicates that Congress did not intend to permit courts to read other unmentioned and open-ended equitable exceptions into the statute.") aff'd on other grounds sub nom. *United States* v. *Giles*, 238 F.3d 425 (6th Cir. 2000).

c. Further support for this conclusion arises from the maxim *"expressio unius est exclusio alterius"*—the presumption that, in a statute, "the expression of one is the exclusion of other." *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 357 (1988); *accord Leatherman* v. *Tarrant Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). This presumption is the default rule when Congress has designated a specific condition or event (e.g., the occurrence of the facts set forth in § 2244(d)(1)(B), (C), (D) and (d)(2)) as having a given effect (e.g., the tolling of the standard limitations period) in a given situation. The effect of the presumption is that other non-designated conditions or events cannot be considered to have the same effect in the given situation. The presumption applies unless it affirmatively would be contrary to, or affirmatively "would render [the] [legislative provision] inconsistent" with, legislative intent. *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 703 (1991); *accord Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 188 (1978); *National R. R. Passenger Corp.* v. *Passengers Ass'n of R. R. Passengers*, 414 U.S. 453, 458 (1974). Here, it cannot reasonably be disputed that Congress' intent in enacting a

limitations period was to provide a cut-off period after which prisoners' claims would be precluded from federal review, irrespective of the merits of the claims. Refusal to permit additional, judicial "equitable" tolling is not inconsistent with that intent.

d. While exclusion of non-statutory grounds for tolling would be presumed here even if Congress had been silent on the question of judge-created equitable tolling, the conclusion that such grounds are excluded becomes irresistible here for a further reason: Congress has not been silent on the question. In enacting AEDPA, Congress in fact considered the issue of judicial equitable tolling but chose to allow it only in another context—that of expedited capital habeas proceedings. The capital case provision in 28 U.S.C. § 2263(a) prescribes a less-generous 180-day limitations period for seeking habeas relief, and that period commences on the date of state court finality.[1] Only under this more restricted limitations scheme did Congress permit a federal court to grant equitable tolling, for up to 30 days if "a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section." 28 U.S.C. § 2263(b)(3). The necessary conclusion is that Congress' omission of analogous provisions for judicial equitable tolling under § 2244(d) was intentional, and that for courts to engage in such judicial tolling is directly contrary to Congress' intent. *Cf. Lindh* v. *Murphy*, 531 U.S. 320, 330-36

[1] Under this statute, the time for seeking certiorari in this Court will toll the running of the period only if in fact a petition is filed and only once the petition is filed. 28 U.S.C. § 2263(b)(1); *compare* 28 U.S.C. § 2244(d)(1)(A) (in the standard case, time for seeking certiorari credited to prisoner even if no certiorari petition ever filed).

(1997) (drawing the negative implication that chapter 153 of AEDPA did not apply to pending cases from the fact that chapter 154, addressing a similar issue, expressly provided its applicability to pending cases).

e. Finally, in interpreting statutes of limitations, this Court has looked to the burden equitable tolling would have on government operations. *See Brockamp*, 519 U.S. at 352-53. Here, reading equitable tolling into § 2244(d) would impose significant burdens on state governments. Each year, states are forced to litigate equitable tolling in potentially thousands of habeas cases. And, because equitable tolling determinations are fact-intensive and made on a case-by-case basis, they are especially time-consuming. The result is burdensome litigation that drains state criminal justice resources—and federal resources—in precisely the type of case Congress intended to be summarily dismissed.

4. It is true, as *amici* acknowledged earlier (see p. 2, *ante*), that most federal circuits have concluded that § 2244(d) remains subject to judge-created tolling.[2] But several federal circuits have openly expressed doubt about such non-statutory tolling under AEDPA. *E.g., David* v. *Hall*, 318 F.3d 343, 346 (1st Cir. 2003) ("section 2244(d)

---

[2] *E.g., Neverson* v. *Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004); *Baldayaque* v. *United States*, 338 F.3d 145, 150-51 (2d Cir. 2003); *Dunlap* v. *United States*, 250 F.3d 1001, 1008-09 (6th Cir. 2001); *Kreutzer* v. *Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Harris* v. *Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000); *Taliani* v. *Chrans*, 189 F.3d 597, 598 (7th Cir. 1999); *Sandvik* v. *United States*, 177 F.3d 1269, 1271-72 (11th Cir. 1999) (per curiam); *Fisher* v. *Johnson*, 174 F.3d 710, 713 (5th Cir. 1999); *Miller* v. *N.J. State Dep't of Corrections*, 145 F.3d 616, 617-18 (3d Cir. 1998); *Miller* v. *Marr*, 141 F.3d 976, 978 (10th Cir. 1998); *Calderon* v. *United States Dist. Court*, 128 F.3d 1283, 1288-89 (9th Cir. 1997), overruled on other grounds by 163 F.3d 530 (9th Cir. 1998) (en banc).

comprises six paragraphs defining its one-year limitations period in detail and adopting very specific exceptions. Congress likely did not conceive that the courts would add new exceptions and it is even more doubtful that it would have approved of such an effort."); *Donovan* v. *Maine*, 276 F.3d 87, 92 (1st Cir. 2002) ("whether, as a matter of law, equitable tolling is available, even in a factually appropriate case, in respect to section 2244(d)(1) . . . is not free from doubt."); *Taliani*, 189 F.3d at 598 ("it is unclear what room remains for importing the judge-made doctrine of equitable tolling. . . ."); *see also Solomon*, 467 F.3d at 935 (equitable tolling conflicts with the detailed provisions of AEDPA) (Griffin, J., dissenting). Some courts have gone even further, outright rejecting judicial tolling under AEDPA as inconsistent with the text of the statute. *See, e.g., Pollard*, 161 F. Supp. 2d at 12 ("Congress did not intend that § 2255 motions be subject to equitable tolling."); *Giles*, 6 F. Supp. 2d at 649-50 ("[T]he language of § 2255 indicates that Congress intended to limit a federal court's discretion in tolling the one year time limit."); *cf. Hernandez* v. *Sullivan*, 397 F. Supp. 2d 1205, 1207 n.2 (C.D. Cal. 2005).

Most of the federal circuits that have judicially tolled AEDPA's statute of limitations have erred in failing to consider whether such tolling is consistent with the text of the statute, as *Beggerly* requires. *Solomon*, 467 F.3d at 940 (describing circuit cases upholding equitable tolling under the AEDPA as "follow-the-leader decisions" containing "little analysis" and failing to acknowledge *Beggerly* and *Brockamp*) (Griffin, J., dissenting). Instead, circuit courts have mostly concluded that, because § 2244(d) is a statute

of limitations, rather than a jurisdictional bar, it is therefore subject to judicial tolling.[3] But this Court in *Brockamp* and *Beggerly* did not simply ask whether the applicable statute of limitations was "jurisdictional." Rather, this Court examined the availability of equitable tolling by looking at the language and purpose of the statute. To say that the § 2244(d) limitations period is not jurisdictional merely begs the paramount question of "whether the judiciary is authorized to rewrite 28 U.S.C. § 2255 to include other 'equitable' grounds of tolling not provided for by Congress." *Solomon*, 467 F.3d at 940 (Griffin, J., dissenting).

A proper understanding of the text of § 2244(d) and the purposes for its enactment demonstrates that Congress did not intend for the judiciary to read further non-statutory exceptions into the statute. Certiorari should be granted to vindicate Congress' plan in AEDPA and to ensure that the lower federal courts apply this Court's holdings.

II. NON-STATUTORY TOLLING OF AEDPA'S LIMITATIONS PERIOD IMPOSES ILLOGICAL, COSTLY, AND UNNECESSARY BURDENS ON STATE RESOURCES

Congress enacted the AEDPA statute of limitations to eliminate needless delay, conserve limited state resources, and expedite finality. *See Day* v. *McDonough*, __ U.S. __,

---

[3] *Dunlap*, 250 F.3d at 1004 & n.1; *Harris*, 209 F.3d at 328-30; *Smith* v. *McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Taliani*, 189 F.3d at 598; *Sandvik*, 177 F.3d at 1271-72; *Moore* v. *United States*, 173 F.3d 1131, 1134 (8th Cir.1999); *Davis* v. *Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998); *Miller*, 145 F.3d at 617-18; *Miller*, 141 F.3d at 978; *Calderon*, 128 F.3d at 1288.

126 S. Ct. 1675, 1681 (2006) (citing *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)); *Duncan*, 533 U.S. at 179 (purpose of AEDPA is to reduce "the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review."); *id.* (AEDPA's one-year limitations period "quite plainly serves the well-recognized interest in the finality of state court judgments"); *accord Rhines* v. *Weber*, 544 U.S. 269, 276 (2005); *see* Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process, Hearing on S. 623 before the S. Comm. on the Judiciary, 104th Cong. 3 (1996) (remarks of Sen. Hatch, Chairman (one of AEDPA's original authors) that the goal of the habeas reform bill is to "eliminate unnecessary delay," "maintain[] ... the finality of the decisions of our State courts," and "get some effective resolution of the ... lengthy, frivolous appeal problems."); 141 Cong. Rec. S7840 (daily ed. June 7, 1995) (statement of Sen. Biden) ("I agree with my Republican colleagues from Utah and Pennsylvania that we ought to have a strict statute of limitations. . . .").

1. But the widespread practice of needlessly litigating equitable tolling issues has become increasingly burdensome to the states and to the judiciary. In 2006 alone, the doctrine of equitable tolling was apparently considered in over 1,500 federal habeas cases.[4]

---

[4] Based on existing data, it is difficult to know precisely what percent of federal habeas cases involve equitable tolling issues. Federal courts currently do not maintain any statistics that identify the reasons why federal habeas petitions are dismissed. *See* U.S. District Courts—Civil Cases Terminated by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2005, available at http://www.uscourts.gov/judbus2005/contents.htmlappendices/c04sep01.pdf (detailing the number

(Continued on following page)

Compounding this problem is the fact-intensive nature of the equitable tolling determination. A prisoner seeking equitable relief typically must demonstrate the existence of an extraordinary circumstance. While there are general principles to assist courts in making this determination, there are no "bright-line" rules defining what is an extraordinary circumstance and what is not. *Fisher*, 174 F.3d at 713. Rather, the extraordinary-circumstance inquiry is "highly fact-dependent." *Whalem/Hunt* v. *Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (per curiam). Therefore, district courts cannot simply look to existing precedent in determining whether equitable relief is warranted, but instead must review each pertinent claim individually on a case-by-case basis to evaluate whether the circumstances alleged are extraordinary. *Alexander* v. *Cockrell*, 294 F.3d 626 (5th Cir. 2002) (except where a particular argument in favor of equitable tolling has been rejected outright, the court must consider the individual facts and circumstances of the case).[5]

---

of habeas matters dismissed without explanations of the reason for their dismissal). A search of the WestLaw ALLFEDS data base indicates there were 1,512 federal habeas opinions issued in 2006 that referred to equitable tolling of the AEDPA limitations period. Because not all federal court decisions are included in the WestLaw data base, undoubtedly there were more equitable tolling decisions in 2006 than this number indicates.

[5] Some of the varied circumstances prisoners have litigated as grounds for equitable tolling include attorney negligence, *Wilson* v. *Battles*, 302 F.3d 745, 748 (7th Cir. 2002); attorney incapacity, *Modrowski* v. *Mote*, 322 F.3d 965, 968 (7th Cir. 2003); the conduct of fellow inmates, *Paige* v. *United States*, 171 F.3d 559, 560-61 (8th Cir. 1999); a prisoner's *pro se* status, *Donovan*, 276 F.3d at 94; the time expended by a prisoner searching for counsel, *Jihad* v. *Hvass*, 267 F.3d 803, 806 (8th Cir. 2001); the closeness of meeting the limitations deadline, *Lattimore* v. *Dubois*, 311 F.3d 46, 53-54 (1st Cir. 2002); the prisoner's legal abilities, *Marsh* v. *Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000); the petitioner's language abilities, *Cobas* v. *Burgess*, 306 F.3d 441, 444 (6th

(Continued on following page)

This struggle to decide what is "extraordinary" results in time-consuming litigation, the expenditure of limited judicial and governmental resources, and significant delays. Lisa L. Bellamy, *Playing For Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 Am. J. Crim. L. 1, 53-54 (2004) (equitable tolling in AEDPA cases results in "a complicated, inconsistent procedural morass that is difficult for the most knowledgeable legal scholar to understand, let alone a pro se habeas petitioner.").

In addition to deciding whether there are extraordinary circumstances, courts must make the additional factual determination of whether the prisoner was pursuing his rights diligently. Like the extraordinary circumstance determination, there are no set guidelines for deciding what constitutes reasonable diligence. Instead, courts must engage in a highly factual analysis of the totality of the circumstances. Typically, this requires a close examination of the specific timing of various events both with respect to the filing of the federal habeas petition and the period the petitioner was exhausting state court remedies. *See, e.g., Lacava* v. *Kyler*, 398 F.3d 271, 277 (3d Cir. 2005). And, in order to determine whether extraordinary circumstances *caused* the prisoner to file an

---

Cir. 2002); transfers between prison facilities, *Hardy* v. *Conway*, 299 F. Supp. 2d 159, 161 (E.D.N.Y. 2004); solitary confinement, *id.*; lockdowns, *id.*; the availability of transcripts to the prisoner, *Gassler* v. *Bruton*, 255 F.3d 492, 495 (8th Cir. 2001); the severity of the sentence, *Trenkler* v. *United States*, 268 F.3d 16, 27 (1st Cir. 2001); a change in controlling law, *Shannon* v. *Newland*, 410 F.3d 1083 (9th Cir. 2005); the petitioner's physical or mental illness, *Laws* v. *Lamarque*, 351 F.3d 919 (9th Cir. 2003); the lack of an adequate prison law library, *Whalem/Hunt*, 233 F.3d at 1146; and the confiscation of the prisoner's legal papers, *Valverde* v. *Stinson*, 224 F.3d 129, 133-35 (2d Cir. 2000).

untimely petition, "courts are forced to conduct painstaking analysis to calculate the precise duration of the alleged extraordinary circumstance." Bellamy, *supra*, at 30; *see also Spitsyn* v. *Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (courts must determine whether the "extraordinary circumstance" was the cause of the petitioner's untimeliness).

Particularly disruptive is the ease with which prisoners obtain evidentiary hearings. So long as the allegations, if true, would entitle the prisoner to equitable tolling, an evidentiary hearing is conducted. *Laws*, 351 F.3d at 919. This allows prisoners—based on unsubstantiated, conclusory allegations—to effectively stop the collateral review process in its tracks and substantially delay the federal proceeding. And, once an evidentiary hearing is ordered, counsel is usually appointed followed by motions to conduct discovery or expand the record. *See, e.g., Laws*, 351 F.3d at 924 (district court on remand shall order discovery, expansion of the record, or an evidentiary hearing to assess equitable tolling claim). Further, if the prisoner has alleged the existence of a mental condition as grounds for equitable tolling, a mental health expert could be appointed. *See, e.g., Nara* v. *Frank*, 264 F.3d 310, 320 (3d Cir. 2001).

2. The resultant delays undermine the states' interest in finality, which is "essential to both the retributive and the deterrent functions of criminal law." *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998). Inroads on the concept of finality "tend to undermine confidence in the integrity of our procedures and inevitably delay and impair the orderly administration of justice." *Custis* v. *United States*, 511 U.S. 485, 497 (1994). The more prolonged the review process, the greater the risk that the

passage of time, erosion of memory, and dispersion of witnesses will preclude any retrial of the defendant and "reward the accused with complete freedom from prosecution." *Engle* v. *Isaac*, 456 U.S. 107, 127-28 (1982); *David*, 318 F.3d at 347 ("There is a strong public interest in the prompt assertion of habeas claims. Normally, the grant of habeas relief leaves the state free to retry the petitioner, but this becomes increasingly hard to do as memories fade, evidence disperses and witnesses disappear.") Permitting tolling beyond that provided by the statute introduces an additional element of uncertainty concerning the finality of state judgments—a result inconsistent with the goals of AEDPA and the criminal justice system.

3. This case illustrates how the judicial application of a non-statutory tolling exception undermines the purposes of AEDPA. It is undisputed that inmate Kephart's federal petition was untimely. Yet he was able to evade dismissal and obtain an evidentiary hearing by alleging in conclusory fashion that the prison library was inadequate. So far, the equitable tolling issue has resulted in litigation before the magistrate judge, the district judge, and the Ninth Circuit. There will be an evidentiary hearing, followed by findings and recommendations from the magistrate judge and then a decision from the district judge. Undoubtedly, the equitable tolling issue will be the subject of a second appeal should the prisoner fail to obtain equitable relief in the district court. Certainly this is not what Congress intended when it enacted § 2244(d).

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Dated: February 23, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California

MANUEL MEDEIROS
State Solicitor General

DONALD DENICOLA
Deputy State Solicitor

DAVID ANDREW ELDRIDGE
Deputy Attorney General

BRIAN R. MEANS
Deputy Attorney General
Counsel of Record

Counsel for Amici Curiae States